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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROGER NICHOLAS MONTUE, Defendant and Appellant.	C087029 (Super. Ct. No. 16FE005382) OPINION ON TRANSFER

Defendant and appellant Roger Nicholas Montue was charged with two counts of lewd or lascivious acts with a child under 14 (Pen. Code, § 288, subd. (b)(1)).[1] The prosecution also alleged that defendant had a prior conviction for forcible rape (§ 261, subd. (a)(2)), a circumstance triggering application of the "One Strike" law (§ 667.61, subd. (d)(1)) and a serious felony and prior strike under the "Three Strikes" law (§§ 667, subds. (a), (b)-(i), 1170.12). Defendant was found guilty by the jury on both counts.

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[1] Unless otherwise designated, statutory references are to Penal Code.

Defendant waived jury trial on the prior conviction allegation, which the trial court found to be true. The court sentenced defendant to 25 years to life on each count under the One Strike law (§ 667.61, subd. (a)), multiplied by two to 50 years for the prior rape conviction under the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)). The court imposed a five-year enhancement under section 667, subdivision (a), on each count for defendant's prior serious felony conviction. Defendant was sentenced to an indeterminate term of 100 years in state prison plus a determinate term of 10 years.

Defendant raised five issues on appeal concerning: (1) the admission of the statements of the victim, K., to her sister and mother and a letter K. wrote as "fresh complaint" evidence; (2) the admission of both testimony and certified documents relating to defendant's prior guilty plea to the rape charge; (3) sentencing defendant under the One Strike law on both counts one and two when the One Strike circumstance was only alleged in count one; (4) sentencing defendant under both the One Strike and Three Strikes statutes; and (5) remand under a recent revision of section 667, subdivision (a), and section 1385, subdivision (b), which now permits a trial judge to exercise discretion whether or not to impose a five-year enhancement for a prior serious felony conviction.

In our prior opinion, we held that it was not necessary for the charging document to allege a One Strike circumstance in each count to give defendant fair notice that the prior conviction allegation applied to both counts. The California Supreme Court granted review and transferred the matter back to this court with directions to vacate the prior decision and reconsider the case in light of *People v. Anderson* (2020) 9 Cal.5th 946 (*Anderson*). As directed, we vacated our prior decision. We now conclude that defendant did not receive adequate notice that the One Strike law would be applied to count two because it was only alleged in count one of the operative pleading.

As to defendant's other issues on appeal, we determine that: (1) defendant forfeited a challenge to the admission of fresh complaint evidence by failing to request a

limiting instruction or objecting to the evidence at trial; (2) admission of testimony and documentary evidence regarding defendant's prior rape conviction was not error; (3) sentencing defendant under both the One Strike and Three Strikes law is permissible under *People v. Acosta* (2002) 29 Cal.4th 105 (*Acosta*); and (4) remand is unwarranted under revised section 667, subdivision (a), and section 1385, subdivision (b), because the trial judge clearly indicated he would not exercise his discretion in defendant's favor.

The sentence on count two under the One Strike law is stricken and the case remanded for the trial court to resentence defendant on count two. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

Defendant's Acts with K.

K. testified at trial; she was 14 at the time.[2] She identified defendant in court.

K. was born in 2003. When K. was four or five, she used to visit her grandmother frequently in Sacramento. K. would often stay overnight.

K. first met defendant, who she referred to as "Marre," in her grandmother's living room. K. remembered she was wearing a long shirt and a "pull-up." K. wore pull-ups just when she was at her grandmother's house. K. remembered that defendant gave her a "weird look"; he "kind of look[ed her] up and down."

K. remembered that defendant lived with K.'s grandmother for a short period of time, staying in the upstairs guest room. K. acknowledged that she remembered the layout of the house "[j]ust a little bit." K. would stay in her grandmother's room.

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[2] Pursuant to California Rules of Court, rule 8.90(b)(4), (10), we identify K., her mother, Latrese B., and witnesses regarding prior sexual offenses, by only one initial in the case of K., by two initials for one witness, S.T., and by the first name and initial for all others.

The first time K. remembered defendant doing anything to her was when he asked K.'s grandmother if K. would like to watch a movie in the guest room. Her grandmother asked K. if she wanted to and she said yes.

K. went into the guest room and was lying on the floor on her stomach with her chin on her fists watching television. Defendant came in and closed the door. K. heard a belt unbuckle. K. heard defendant pull his pants down. K. asked where her grandmother was and defendant said, "shh." K. tried to turn around and defendant told her to turn back around. Defendant got down on his knees and leaned over with his hands on either side of K.'s body. Defendant pulled down K.'s pull-up. K. kept asking for her grandmother. K. could feel defendant's penis in her bottom, going back and forth. Defendant put his hand over K.'s mouth and said if she told anybody, he would kill her, and then he put his hand back down. K. was scared that defendant would kill her. Defendant put his penis in K.'s anus and she felt pain. Afterwards she felt like her bottom was sore. Defendant pulled K's pull-up back up and went to take a shower. When defendant took a shower, K. ran back to her grandmother's room. K. did not tell her grandmother what had happened because she was scared. Her grandmother asked her if she liked defendant, and K. said no. K. didn't say why.

The next time defendant did not ask K.'s grandmother if K. wanted to watch television. When defendant was absent from the house, K. would go into the guest room to watch television. K. was in the guest room on the floor on her stomach watching television, again wearing a pull-up and a shirt. Her grandmother was in her own room. Defendant came in and closed the door. Defendant put his penis in K.'s bottom. This time K. felt wetness. Defendant pulled K.'s pull-up back up. Defendant did not say anything to K. and she did not say anything to him. K. changed her pull-up in her grandmother's bathroom. Her grandmother asked K. what she was doing and K. said nothing in response. After that, K. did not see defendant again until trial.

After these incidents, K. started wetting the bed. She did not wet the bed before. K. wore pull-ups at her grandmother's house before but not because she wet the bed, but to be comfortable and to sleep with her grandmother. K. never wet the bed sleeping with her grandmother before the incidents with defendant. Her mother and her grandmother asked why she was wetting the bed, but K. was afraid to tell them.

K. also picked at her eyebrows. She felt like it was a stress reliever. She did not want to tell anyone what had happened.

When K was 12, her family moved to Wilmington, North Carolina where her family had relatives. K.'s stepfather had been murdered in front of their house in Sacramento.

After the move, when K. was 12, she told her younger sister what defendant had done. K. told her sister to be careful about how she acted and dressed because there are a lot of strange people in the world. When her sister asked why, K. said that she had been raped when she was younger. K. told her sister not to tell their mother, but her sister did. K.'s mother hugged her and told it would be okay and it was not her fault. K. told her mother that defendant, her grandmother's friend, did this to her, and that his name was Marre.

Before K. told her sister, K. also told a friend at school what had happened after a speaker in health class talked about rape and its aftermath. When the speaker asked if anyone needed to go to the restroom, K. broke down crying and her friend hugged her and said she had been through it too. K. did not tell anyone else.

K. also went to the school counselor after she wrote down her thoughts in a letter to "Dear friends And family [*sic*]" about her stepfather being murdered and K. being raped. Somebody turned the letter into the office because they thought K. might try to kill herself. But K. was only saying she wanted to stop thinking and worrying about being raped. K. wanted to tell someone. K discussed the letter with the school counselor. K. did not show her mother the letter.

After K. told her mother, she was interviewed by a lady. In the interview, K. described defendant as having dark skin. At trial, she acknowledged that defendant's skin is lighter than hers.

K.'s mother, Latrese B., testified that when K. was four or five she went to her grandmother Elsie's house in Sacramento three or four times a week. At first Latrese's brother was there, but then defendant (Marre) moved into her brother's old room. The house was two stories and had bedrooms upstairs, a full bathroom in the hallway between two bedrooms, a full bathroom in Elsie's room, and a half-bath downstairs.

Latrese met defendant one night when he came out of her brother's room and introduced himself. Latrese thought Elsie and defendant might be dating, though Elsie said he was just renting a room. Latrese was not concerned about defendant's presence in the house because K. slept with Elsie. Defendant lived with Elsie about six or seven months.

Latrese first learned that defendant had sexually assaulted K. in May 2015 after they had moved to North Carolina. K.'s little sister told Latrese that defendant had touched K. when she was living at her grandmother's house and that K. was upstairs crying hysterically. Latrese went upstairs and found K. sitting on the floor, hunched over, crying and shaking. K. told her mother that defendant (Marre) had touched her when she was at Elsie's house.

Over the following weekend, K. related the details of what happened: that defendant pulled down K.'s pull-up, put his penis in her bottom, put his hand over her mouth, and told he would kill her if she said anything. When K. said defendant had put his penis in her bottom, she pointed to her anus. K. said it had happened more than once.

Over the years, Latrese had been trying to figure out what was wrong with K. K. was pulling her eyebrows out and wetting herself. K. did not do this before she met defendant. K. wore pull-ups at Elsie's house even though she was toilet trained, in case she had an accident and so she wouldn't have to get out of bed at night. Between five

and six, K. went from being toilet trained to wetting the bed. Latrese took K. to the hospital and was told it was stress. K. later told Latrese that she was scared to talk about the incidents because defendant told K. he would kill her.

After Latrese learned of the assaults, she went to the police in Wilmington. K. was interviewed. Latrese was not in the room. K. was interviewed a second time by officers from the Sacramento and Wilmington police departments. K. was shown a photograph that she identified as defendant. Latrese was not present for that identification, but she also identified the photograph as defendant. After defendant moved out of Elsie's house, Latrese did not see him again until the trial, where she identified him in court.

K.'s grandmother, Elsie Qualls, testified that her granddaughter visited her frequently in 2007 and 2008 and would often sleep with her. Elsie had a renter living with her in her son's room after her son moved out. Elsie met defendant, called Marre, when they struck up a conversation in line at the telephone company and defendant said he was looking for a room. Elsie was having financial difficulties and had decided to rent the room after her son moved out. Elsie and defendant became friends after he moved in and were intimate a few times. K. wasn't there during those times.

Elsie did not believe that defendant was a danger to K. When defendant was living at her house, Elsie had no idea that defendant had assaulted K. K. had free run of the house and could be in another room from Elsie. Elsie never left defendant alone with K. She could not recall a time when defendant asked if K. could watch a movie with him. At one point, defendant did not come back to the house, leaving his belongings behind. After defendant was gone, he wrote letters to Elsie addressed from jail, signed "Marre." She never saw him again until trial. Elsie identified defendant in court.

In November 2015 Elsie spoke with a detective from the Sacramento Police Department about defendant. She told the detective that defendant had lived with her and gave him defendant's letters.

The detective testified that he also interviewed defendant. Defendant stated that he did not know Elsie, Latrese, or K., and had never stayed at Elsie's house.

Elsie recalled that K. was a happy child before defendant moved in. After defendant moved out, K.'s personality changed; she started pulling out her eyebrows. When Elsie asked her why, K. said she didn't know.

Defendant's Prior Acts

S.T.

S.T. testified at trial. She was 45 at the time.

S.T. met defendant in 1989 when they were both attending college. He asked for her telephone number. He called her a lot, more than she was comfortable with. She soon realized he was interested in more than friendship. She was not attracted to him and made that clear to him.

About a week after they met, defendant called S.T. She was upset and crying because she was moving out of her friend's residence. Defendant asked if he could come over and she let him. She said they had to leave because her roommate did not like defendant and was on her way home. They left in his car to go to a video store and then to a liquor store to get wine coolers. S.T., then 18, was not old enough to buy alcohol; defendant bought it. They drank and went to a park.

They went to defendant's apartment near the park because S.T. needed to use the restroom. S.T. became suspicious because there was no furniture in the apartment. She had been there one time before when he offered her a ride and they stopped at his apartment first. There had been furniture then. Defendant tried to kiss her and she pushed him away. S.T. told him she was not interested. Defendant unzipped her jacket and pants and said he just wanted to "taste" her. S.T. told him to stop but she was not able to stop defendant from taking off her pants. Defendant took off his pants. S.T. was trying to hold her legs closed but defendant forced them open. S.T. tried to protect her

vagina with her hands. He pulled her hands away. Defendant told her, "No, don't do that again."

Defendant penetrated S.T. with his penis. Defendant was a large man on top of her. He did not wear a condom. S.T. was praying and calling for her mom. Defendant was angry and aggressive and said that this was "meant," which S.T. did not understand. After defendant finished, S.T. asked, "Why did you do this?" Defendant said he had to go, he had to get out of there.

When defendant left, S.T. hid in the bedroom for a short time in case he came back and then went to a neighboring apartment. The neighbor called the police. S.T. talked to the police about the incident. The next time she heard from law enforcement was 2017. She never saw defendant again until the trial, where she identified him.

Crystal U.

Crystal U., age 38, testified at trial.

In August 1993 when she was 14, Crystal met defendant at her best friend's apartment complex. Crystal was walking around the pool with her friend, and they stopped to say hi to Suzanne, an older woman who was with defendant. Crystal was introduced to defendant and had a brief conversation with him.

Later, Suzanne asked if Crystal wanted to go the store with defendant to get a beer and Crystal said yes. During the car ride, defendant asked Crystal how old she was and she told him she was 14. Crystal could tell defendant was a lot older. They went to a convenience store and bought beer and cigarettes. They went to a school, drank the beer, and chatted. They went back to her friend's apartment. Crystal planned to go with her friend to another person's house to watch movies. Suzanne came back and asked if Crystal would go with her and defendant. Crystal did not want to go. But Suzanne was very persistent and Crystal agreed to go if they would drop her off at the house to watch movies.

Defendant stopped at a convenience store, bought beer, and gave Crystal beer while they were driving around. They stopped at a friend of Suzanne's house. Suzanne got out and Crystal tried to get out, but Suzanne made Crystal stay with defendant.

Crystal and defendant went back to the convenience store for more beer. Crystal told defendant she wanted to go back to the apartment complex or the house to watch movies, but he said no. Crystal had already had three beers. She testified she was young and little and probably completely intoxicated. She did not want more alcohol but defendant urged her to drink more and she did.

Defendant parked in an industrial area. Crystal was feeling nauseous and asked defendant to take her to be with her friend, but he said he wanted to sit there for a bit longer. She wanted to roll the window down but defendant wouldn't let her.

Defendant started to try to recline Crystal's seat in the car. Crystal kept pulling it back up. Crystal thought defendant was going to hurt her. Eventually the seat stayed down. Defendant got on top of Crystal. Defendant pulled his pants down and Crystal's shorts to the side. Crystal could not stop defendant because he was bigger and heavy. After a couple minutes of trying, defendant penetrated Crystal. She told him it hurt. He told her to be quiet and still. He was pinning her arms and legs down. He used his legs to spread her legs. Crystal was sobbing and begging defendant to stop. When defendant stopped, Crystal's underwear was wet. Defendant got off Crystal quickly and pulled his pants back up.

Crystal asked to go to her friend's apartment, but defendant drove to his grandparents' apartment for her to use the telephone to get the address of the house where she planned to go to watch movies. At defendant's grandparents' house, Crystal asked to use the bathroom. Crystal didn't want to leave the bathroom. She didn't want defendant to see how upset she was for fear that he would think she was going to tell. Crystal called her friend for the address and defendant took her there. Defendant asked for her

telephone number and Crystal gave it to him. She wanted to do anything he asked so she could get away from him.

While defendant was driving, he asked Crystal what was going to be her story about what they did. She said she would say nothing. Defendant said that it was really important that he believed she was not going to say anything. Crystal was afraid. When they got to the house, defendant said he had a gun under the seat of the car. Defendant asked Crystal for a kiss and she kissed him.

Crystal told her friend what happened. When they got back to her friend's apartment, her friend's mother called Crystal's mother who called the police. Crystal told the police everything she testified to at trial. Crystal underwent a medical examination. Crystal identified defendant at trial as the person who raped her in 1993.

On September 10, 1993, defendant spoke on the telephone with a sexual assault investigator with the Sacramento Police Department. Defendant admitted knowing Suzanne and Crystal's friend who lived at the same apartment complex, but denied knowing Crystal, driving around with her, and stopping at liquor stores.

The parties' stipulations were read to the jury that, on August 6, 1993, defendant raped Crystal, and, on June 1, 1994, pleaded guilty to forcible rape, in violation of section 261, subdivision (a)(2). The parties further stipulated that defendant was incarcerated in state prison from April 12, 2007, until his release on August 30, 2007, and was arrested on February 8, 2008, and in custody until December 16, 2010.

Tyra D.

Tyra D., age 26, testified at trial. Tyra was with defendant, who she knew as Marre, when he was arrested in February 2008. Tyra was 16 when she met defendant. He offered her a ride. They exchanged telephone numbers. The second time they saw each other Tyra told defendant her age. Defendant lied that he was in his 20's when they first met but disclosed older and older ages as their relationship continued.

A couple weeks after the first encounter, Tyra and defendant began having sexual intercourse, which Tyra was willing to do when defendant asked. Tyra had regular sexual intercourse with defendant up until the time he was arrested. They would see each other a few times a week. Tyra would miss school to see defendant.

Defendant tried to hide that he and Tyra were seeing each other. They would have sexual intercourse in the car or in motel rooms. Tyra drank a lot of alcohol with defendant, which he provided.

One time in a motel room Tyra did not want to have sex with defendant. Defendant wanted anal sex. Defendant turned Tyra over on the bed and tried to force his penis into her anus. Tyra was trying to squeeze her buttocks shut. Defendant told her to relax. Defendant was able to force his penis partially into Tyra's anus. Tyra was in pain. Tyra told defendant she was in pain. After a minute or two, defendant stopped and got in the shower.

Tyra was relieved when defendant was arrested. He was controlling and wouldn't let her have friends. Once when defendant was angry, he slapped Tyra hard in the face.

The night defendant was arrested Tyra had sex with him in the motel room. Defendant told Tyra to tell the police that they had just met. Tyra gave a statement to police that she had met defendant two hours earlier and that they had never had sex. Defendant told her to say that.

Defendant wrote letters to Tyra from jail. The next time Tyra heard from law enforcement about defendant was 2017. Tyra identified defendant in court.

DISCUSSION

Fresh Complaint Evidence

Defendant contends that the trial court erred in admitting K.'s statements to her mother and sister about defendant and her letter under the fresh complaint doctrine. Under the doctrine, out-of-court statements by the victim of a sexual offense are admissible to show the victim complained, but not for the truth of the facts contained

therein. (*People v. Brown* (1994) 8 Cal.4th 746, 763 (*Brown*).) Defendant argues that the court did not "restrict[] the testimony regarding these complaints to the limited purpose underlying the doctrine" and did not "instruct the jury that it could not consider the evidence for its truth, but only for the fact that the complaint was made."

However, defendant never objected to the testimony or requested a limiting or clarifying instruction, thereby forfeiting the issue on appeal.[3] The prosecutor submitted an in limine motion to admit K.'s disclosures of sexual abuse to her sister and mother and her letter. In argument on the motion, the prosecutor offered to narrow the motion to the fact of K.'s disclosure to the sister and counselor, while having just her mother, Latrese, testify about what K. told her and presenting the letter. Defense counsel responded that it was not clear the letter referred to defendant but conceded that concern went to the weight of the evidence. Defense counsel expressed no other opposition to the motion.

When K. and Latrese testified to K.'s disclosure of the details of defendant's conduct with K., defense counsel did not object. The court admitted K.'s letter, in which she referred to "getting raped," into evidence without objection from defense counsel.

The court advised counsel that it intended to instruct the jury with CALCRIM No. 303, which directed the jury generally to consider certain evidence only for the limited purpose for which it was offered.[4] When the trial court asked defense counsel if

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[3] Defendant's counsel appointed after he fired his trial counsel postverdict filed a motion for a new trial, arguing in part that the trial court improperly admitted fresh complaint evidence and failed to give a limiting instruction. After reviewing the parties' briefs and hearing argument, the trial court denied the motion, noting (1) that defense counsel at trial failed to object to questions that elicited fresh complaint evidence and (2) the court had no obligation to sua sponte instruct the jury on the limited purpose of the evidence. On appeal, defendant does not challenge the trial court's denial of his motion for a new trial.

[4] CALCRIM No. 303 states: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

he had any objection, modification, or request for further instructions, defense counsel said no.

In *Brown*, the California Supreme Court set forth the fresh complaint doctrine. (*Brown, supra*, 8 Cal.4th at pp. 749-750.) "[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*Ibid.*)

Under the doctrine, "details of the incident" are not allowed, but limited relevant evidence is admissible. (*Brown, supra*, 8 Cal.4th at pp. 756, 760.) The evidence is admissible only "for the limited purpose of showing that a complaint was made by the victim, and not for the truth of the matter stated. [Citation.] Evidence admitted pursuant to this doctrine may be considered by the trier of fact for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime. [Citation.]" (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522 (*Ramirez*).)

Defendant argues that, although the trial court gave CALCRIM No. 303 to the jury, "no instruction on the limited purpose of 'fresh complaint' evidence was ever provided to the jury, and, as a result, there was no direction to, or reason for, the jury not to consider K. and Latrese's testimony, as well as the letter, admitted into evidence, for their truth."

"On request, the trial court must instruct the jury as to the limited purpose for which fresh complaint evidence was admitted." (*People v. Manning* (2008) 165 Cal.App.4th 870, 880 (*Manning*); *Brown, supra*, 8 Cal.4th at p. 757.) "However, the trial court has no duty to give such an instruction in the absence of a request." (*Manning*, at p. 880.)

Defendant did not request a limiting instruction. (*Manning, supra*, 165 Cal.App.4th at p. 880.) Thus, defendant forfeited on appeal any claimed failure by the trial court to give a limiting instruction by his failure to request it. (*Ibid.*) "[D]efendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

Defendant further argues that he was prejudiced because the court allowed K. and Latrese to testify "to the details of the incidents" and admitted "her letter [which] was not a 'complaint.' " Defendant also forfeited any claim that the trial court allowed the prosecutor to present fresh complaint evidence for its truth, or presented hearsay evidence that did not qualify as fresh complaint, because defense counsel failed to make a timely and specific objection and request an admonition. (Evid. Code, § 353, subd. (a).)

Moreover, even if the trial court erred as defendant contends, the error was harmless. K. "testified at trial, and the jury did not have to rely on her secondhand statements to other people, but was able to hear her directly and judge her credibility. Her fresh complaint statements were consistent with and cumulative to her trial testimony. [Citation.]" (*Manning, supra*, 165 Cal.App.4th at pp. 880-881; *Ramirez, supra*, 143 Cal.App.4th at p. 1526.)

The claim is forfeited and, in any event, any error was harmless.

Prior Acts

Defendant contends the trial court erred in admitting both testimony regarding the forcible rape of Crystal U. and documentary evidence of his conviction for this crime. Defendant argues that "[i]n admitting the documents, the court erred, since it admitted highly prejudicial evidence regarding a prior conviction in the prosecution's case-in-chief, without considering the simultaneous admission of extensive testimonial evidence and the combined effect of the two for [Evidence Code] section 352 purposes."

The prosecution moved in limine to admit Crystal U.'s testimony concerning her rape by defendant under Evidence Code section 1108 "through a certified record of conviction, testimony by Crystal, photographs of Crystal at age 14, and testimony by Officer Pearson, who investigated the case."[5] Defense counsel briefly argued against the motion under Evidence Code section 352 because of the age difference between the five-year-old victim and Crystal U., a teenager at the time defendant raped her. Defendant did not object to the presentation of both testimonial and documentary evidence. The court stated that it had fully considered Evidence Code section 352 factors and granted the motion.

However, the court subsequently questioned whether documentary evidence of defendant's conviction had been specifically discussed and should be admitted. At this point, defense counsel requested that trial of the prior conviction be bifurcated. The prosecutor offered to provide further briefing on the admissibility of documentary evidence of defendant's prior conviction.

The prosecution filed a motion in limine, citing *People v. Wesson* (2006) 138 Cal.App.4th 959, 961 (*Wesson*), which found no error in admitting documentary evidence as propensity evidence under Evidence Code section 1108. After reviewing the motion and hearing argument, the trial court decided to admit documentary evidence of defendant's conviction. The court noted that such evidence is more probative than prejudicial in part because "[i]t does end the uncertainty for a jury, and tends, of course, to end any speculation that a jury may entertain about whether [defendant] was punished or not . . . and would foreclose the possibility that they might be inclined to find him guilty of the current charge because of uncertainty about the old uncharged crime."

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[5] The motion in limine was also based on Evidence Code section 1101, subdivision (b), which allows evidence of prior acts to prove intent, common plan or scheme, or lack of consent.

Ultimately, the parties stipulated that defendant raped Crystal U. in 1993 in violation of section 261, subdivision (a)(2), and pleaded guilty to that offense in 1994.

"Evidence Code section 1108 allows propensity evidence to be used in cases involving sexual offenses. Specifically, the statute provides that if the defendant is charged with committing a sexual offense, then evidence that the defendant committed other sexual offenses in the past is admissible, unless the trial court determines it should be excluded pursuant to the weighing provisions of Evidence Code section 352. [Citation.] This rule directly opposes the traditional view that propensity evidence should not be admitted when determining a defendant's guilt. [Citations.]" (*People v. Lopez* (2007) 156 Cal.App.4th 1291, 1295 (*Lopez*).)

"Evidence Code section 1108, subdivision (a) makes admissible 'evidence of the defendant's commission of another sexual offense.' 'Evidence' is defined as 'testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.' (Evid. Code, § 140.) Thus, while [*Wesson*] . . . held that documentary evidence of prior convictions may be used to prove the defendant committed a prior sexual offense, Evidence Code section 1108 also permits testimony about prior sexual offenses." (*Lopez, supra,* 156 Cal.App.4th at p. 1298.)

Since both testimony and documentary evidence are admissible under Evidence Code section 1108, defendant's argument boils down to the claim that the trial court abused its discretion under Evidence Code section 352 in admitting both types of evidence.

We review "the admissibility of evidence of prior sex offenses under an abuse of discretion standard. [Citation.] A trial court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*Wesson, supra,* 138 Cal.App.4th at p. 969.)

Defendant has not offered any authority for the proposition that presentation of both testimonial and documentary evidence regarding a criminal defendant's prior sexual offense violates Evidence Code section 352. To the contrary, in *People v. Lewis* (2009)

46 Cal.4th 1255 (*Lewis*), the prosecution moved in limine to admit the testimony of a victim of a prior rape by the defendant *and* documentary evidence concerning his conviction for that offense. (*Id.* at p. 1284.)[6] The trial court ruled that the evidence was admissible. (*Lewis*, at p. 1284.)

The Supreme Court affirmed, holding that the evidence was more probative than prejudicial under Evidence Code section 352. (*Lewis, supra*, 46 Cal.4th at p. 1287.) In particular, the court concluded that "[t]he risk of *undue* prejudice was minimal." (*Ibid*.) As here, the Supreme Court reasoned that "[b]ecause defendant was convicted of the prior rape and sentenced to prison, 'the jury would not be tempted to convict [him] simply to punish him for the other offense, and . . . the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses.' " (*Ibid.*, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) In *Wesson*, the trial court similarly enumerated as a factor considered in the Evidence Code section 352 weighing process: " 'The fact that the defendant pled guilty to the prior offenses and was sentenced to prison resolves the degree of certainty issue, and the jury will not be distracted by speculating whether the defendant is or was guilty of the now uncharged offenses and/or should be punished for them. We can also be ensured that the jury will not be tempted to convict the defendant simply to punish him for other offenses and their attention will not be diverted by having to make a separate determination on whether the defendant committed those other offenses.' " (*Wesson, supra*, 138 Cal.App.4th at p. 966.)

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6 The prior victim in *Lewis* testified to a brutal rape in which the defendant threatened to "slice her throat," threatened to kill her if she reported the incident to law enforcement, choked her until she lost consciousness, and told her "I'm going to get you, bitch," when she identified him to police officers. (*Lewis, supra,* 46 Cal.4th at pp. 1276-1277.)

Defendant, however, argues that "there was no end to the uncertainty" because of the parties' stipulations regarding prison terms defendant served in 2007 and 2008 to 2010, rather than in 1994 after defendant pleaded guilty to raping Crystal U. Defendant asserts that the stipulations "[i]nstead of convincing the jury that [defendant] had 'paid his debt to society' . . . suggest that [defendant] served no time at all for that offense." Defendant does not persuade us that the jury, informed that defendant pleaded guilty in 1994 to forcible rape of a 14-year-old girl, would come to the conclusion that he had completely avoided prison time simply because he stipulated to serving other prison terms more than a decade later.

We find no abuse of discretion in the trial court's conclusion that the probative value of this evidence outweighed any prejudicial effect.

One Strike Sentencing

Defendant contends the trial court erred in imposing a sentence of 25 years to life on both counts one and two under the One Strike law (§ 667.61), because a circumstance triggering the application of that statute—i.e., defendant's prior conviction for forcible rape (§ 261, subd. (a)(2))—was only pled under count one and not count two.

The One Strike law (§ 667.61) sets forth "an 'alternative and harsher sentencing scheme for certain sex crimes.' [Citation.]" (*People v. Perez* (2015) 240 Cal.App.4th 1218, 1223 (*Perez*).) The statute requires indeterminate life terms for certain sex offenses committed under enumerated circumstances. Among those offenses, the statute reaches the crime of lewd or lascivious acts with a child under the age of 14 in violation of section 288, subdivision (a). (§ 667.61, subds. (a) & (c)(8).). Circumstances triggering application of the One Strike law include that the defendant has previously been convicted of forcible rape (§ 261, subd. (a)(2)). (§ 667.61, subds. (c)(1) & (d)(1).) The alternative sentence for such offenses when committed under a One Strike circumstance is greater than the determinate sentences for the offenses alone. (§ 288, subd. (b) [lewd or lascivious act with a child under 14 by force or fear punished by five,

eight, or 10 years in state prison].) Under the One Strike law, the sentence for a lewd or lascivious act with a child under 14 is 25 years to life. (§ 667.61, subd. (a).)

The One Strike law mandates that "[t]he penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact." (§ 667.61, subd. (o).) Further, section 667.61, subdivision (f), repeatedly refers to the circumstances in subdivision (d) of the statute as being "pled and proved" to invoke the punishment prescribed in subdivision (a).

In *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), the California Supreme Court held that the prosecution must allege "which qualifying circumstance or circumstances are being invoked for One Strike sentencing . . . ." (*Id.* at p. 752.) The court said that "this outcome is dictated not only by the language of the One Strike law, but also by due process because 'the fair notice afforded by that pleading requirement may be critical to the defendant's ability to contest the factual bases and truth of the qualifying circumstances'; may be essential for the defendant to assess his sentencing 'exposure'; and may be necessary for the defendant to know what he must admit to if he elects to enter a plea.' (*Mancebo*, at pp. 746-747, 750, 752.)" (*Perez, supra*, 240 Cal.App.4th at p. 1223.) The court in *Mancebo* concluded that the trial court erred in sentencing the defendant under the One Strike law for an unpled multiple victims circumstance, even though the prosecution convicted defendant of committing crimes against two women. (*Mancebo, supra*, 27 Cal.4th at p. 753.) Sentencing error occurred because the prosecution's pleading gave defendant notice that gun use would be one of the circumstances supporting One Strike prison terms, but, in sentencing, the trial judge substituted a multiple victims circumstance that was never alleged. (*Ibid.*)

In this case, the amended information alleged in count one that defendant committed a lewd and lascivious act on K. in violation of section 288, subdivision (b)(1).

Count one further alleged that defendant had previously been convicted of forcible rape under section 261, subdivision (a)(2), within the meaning of the One Strike law (§ 667.61, subd. (d)(1)). Count two alleged that defendant violated section 288, subdivision (b)(1), but did not include the allegation of a prior conviction for forcible rape under the One Strike law. Count two alleged that defendant was ineligible for sentencing to county jail due to a prior or current serious felony conviction, or because he is a registered sex offender, but did not specifically refer to his conviction for forcible rape or the One Strike law. In a separate section titled "Prior Conviction," the amended information alleged that defendant was convicted in 1994 for forcible rape, a serious felony and prior strike under the Three Strikes law (§§ 667, subds. (a), (b)-(i), 1170.12).

The probation report stated that the One Strike allegation under section 667.61, subdivision (d)(1), was found true "as to Counts 1 and 2." The report recommended "[r]egarding Counts 1 and 2," that defendant be sentenced to an "indeterminate term of twenty-five (25) years to life, as to each count, doubled to fifty (50) years to life, as to each count" under the Three Strikes law "for a total indeterminate term of one hundred (100) years to life." At the sentencing hearing, the prosecution urged the trial court to sentence defendant in conformance with the recommendation of the probation report, including consecutive sentences for each count. Defense counsel argued only "as to the two counts, the Court has the discretion to run that concurrent with one another." Defense counsel did not raise an issue regarding any omission in the allegations of count two of the amended information as to the One Strike law. The trial court determined that the prosecutor's argument was correct that the sentences under counts one and two must be consecutive, because defendant's lewd acts with K. occurred on separate occasions.

In *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), the defendant contended that he could not be sentenced to 25 years to life under an enhancement for firearm use (§ 12022.53, subd. (d)), which had not been pled in the count charging the defendant with shooting at an occupied vehicle, although the enhancement had been alleged in two other

counts and was found true by the jury as to all three counts. (*Riva, supra*, 112 Cal.App.4th at p. 1001.) The court held that the requirement in section 12022.53, subdivision (j), that the enhancement " '*shall be alleged in the information* or indictment' " was satisfied because this provision "only requires the facts necessary to sustain the enhancement be alleged in the information; it does not say where in the information those facts must be alleged or that they must be alleged in connection with a particular count in order to apply to that count." (*Riva, supra*, 112 Cal.App.4th at p. 1001.)

The court in *Riva* distinguished *Mancebo* "because the enhancement the trial court imposed was never pled as to any count by name, number or description of the qualifying circumstances." (*Riva, supra*, 112 Cal.App.4th at p. 1002.) In *Riva*, the enhancement "was pled by number and description as to some of the counts in the information, just not the one on which the trial court imposed it." (*Ibid.*) The defendant was on notice he had to defend against the enhancement because it was alleged in the other two counts that went to trial. (*Id.* at p. 1003.)

In *Anderson, supra*, 9 Cal.5th 946, the defendant argued for the first time on appeal that the trial court erred in imposing 25-year-to-life vicarious firearm discharge enhancements (§ 12022.53, subd. (d)) not alleged in five robbery counts in the information. (*Anderson, supra*, 9 Cal.5th at p. 952.) The Court of Appeal concluded under *Riva* that the information adequately pleaded the enhancement, which had been pled as to other counts on the same set of facts, and distinguished *Mancebo* on the ground that the enhancement at issue in that case was not pled as to any count. (*Anderson, supra*, 9 Cal.5th at p. 952.)

The California Supreme Court in *Anderson* disapproved *Riva*. (*Anderson, supra*, 9 Cal.5th at p. 956.) The court held: "A pleading that alleges an enhancement as to one count does not provide fair notice that the same enhancement might be imposed as to a different count. When a pleading alleges an enhancement in connection with one count

but not another, the defendant is ordinarily entitled to assume the prosecution made a discretionary choice not to pursue the enhancement on the second count, and to rely on that choice in making decisions such as whether to plead guilty or proceed to trial. [Citation.] Fair notice requires that every sentence enhancement be pleaded in connection with every count as to which it is imposed. [Citation.]" (*Anderson, supra*, 9 Cal.5th at pp. 956-957)

In light of *Anderson*, it is clear that procedural due process required the prosecution to allege a One Strike circumstance in count two if the alternative, harsher sentence under the One Strike law was to be imposed on that count (See *Perez, supra*, 240 Cal.App.4th at p. 1227 ["The People must allege the specific One Strike law circumstances it wishes to invoke as to each count it seeks to subject to the One Strike law's heightened penalties"].) Due process mandated that, at the pleading stage, defendant be fully informed of the potential sentence he faced on each count. The prosecution failed to do so. It was a violation of defendant's due process rights for the prosecution to seek, and the trial court to impose, a One Strike sentence as to count two.

The Attorney General concedes the error under *Anderson* but argues that defendant forfeited a challenge to the unpled One Strike allegations in count two by failing to object in the trial court. "As a general rule, a criminal defendant who fails to object at trial to a purportedly erroneous ruling forfeits the right to challenge that ruling on appeal. [Citation.]" (*Anderson, supra*, 9 Cal.5th at p. 961.)

In *Anderson*, the court rejected the proposition that a pleading defect necessarily results in unauthorized sentence correctable at any time, including if first raised on appeal. (*Anderson, supra*, 9 Cal.5th at p. 962.) The court cited *People v. Houston* (2012) 54 Cal.4th 1186 (*Houston*), where a defendant sentenced to life imprisonment for attempted murder forfeited a claim that the indictment failed to allege that the attempted murders were willful, deliberate, and premeditated. (*Anderson, supra*, 9 Cal.5th at p. 962; *Houston, supra*, 54 Cal.4th at p. 1225.) The claim was forfeited because "the trial

court had, during trial, given the defendant notice of his potential sentence on the attempted murder count and asked the parties if they had objections to instructions and verdict forms asking the jury to determine whether the attempted murders were willful, deliberate and premeditated." (*Anderson*, at p. 962; *Houston*, at p. 1227.)[7]

However, an appellate court has discretion to "decide an otherwise forfeited claim where the trial court has made an error affecting 'an important issue of constitutional law or a substantial right.' [Citation.]" (*Anderson, supra*, 9 Cal.5th at p. 963.) In *Anderson*, the court concluded the trial court had made such an error for three reasons. (*Ibid.*) For the same reasons, we conclude that the error in this case is within our discretion to correct.

First, the *Anderson* court said the error was "clear and obvious"; that is, the trial court imposed enhancements that were never pleaded. (*Anderson, supra*, 9 Cal.5th at p. 963) The Attorney General concedes that the pleading error here is "obvious."

Second, "the error affected substantial rights by depriving [defendant] of timely notice of the potential sentence he faced." (*Anderson*, *supra*, 9 Cal.5th at p. 963.) The Attorney General argues that "[f]rom the start of trial, the prosecution expressed its intent

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[7] In *People v. Perez* (2017) 18 Cal.App.5th 598, we explained in detail the particular circumstances in *Houston* that provided adequate notice to the defendant: "In *Houston*, the trial court directly and plainly informed the defendant that it was planning to instruct the jury on the two options for attempted murder. Not only did the trial court expressly raise the issue, but it invited a response from the parties. Receiving none, it again informed the defendant that it had prepared a verdict form directing the jury to make a special finding whether the attempted murders were willful, deliberate, and premeditated. Having been given notice twice during the trial that he would be subject to an attempted first degree murder verdict, the court then instructed on the additional elements necessary to find premeditated attempted murder." (*Id.* at p. 618.) Thus, "[w]hile the Supreme Court was willing to forgive the prosecutor's transgression in *Houston*, it was precisely because the trial court had provided what the prosecutor had failed to do; that is, the court was satisfied the defendant was accorded fair notice of the charges he faced and an adequate opportunity to object or to tailor his defense." (*Ibid.*)

to seek a One Strike sentence on counts 1 and 2." In support of this statement, the Attorney General cites a single line from the introduction section of the prosecution's trial brief: "Defendant is additionally charged with a special allegation of Penal Code section 667.61(d)(1) as to Counts One and Two." This statement, of course, was incorrect. Moreover, unlike *Houston*, the trial judge did not explain to defendant his potential life sentence under the One Strike law on count two. Rather, like *Anderson*, "there was no midtrial discussion highlighting the prosecution's intent" to seek a One Strike sentence on both counts one and two. (*Anderson, supra*, 9 Cal.5th at p. 963.)

The Attorney General also argues that, at the court trial on the truth of the prior conviction, the prosecution stated its intention to use the prior conviction for a One Strike sentence on both counts. However, the portion of the transcript the Attorney General cites makes no reference to multiple counts and consists of the prosecutor's statement that "[section] 667.61(d)(1) making this a life case", which would be true of a One Strike sentence on count one alone. Finally, the Attorney General maintains that at the sentencing hearing the prosecutor argued for a One Strike sentence on both counts. Notice provided at sentencing of the prosecution's intent contrary to the accusatory pleading is clearly inadequate. (*Anderson, supra*, 9 Cal.5th at p. 963.)

Third, "the error was one that goes to the overall fairness of the proceeding." (*Anderson, supra*, 9 Cal.5th at p. 963.) " ' "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." [Citations.] "A criminal defendant must be given fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial." ' [Citation.]" (*Anderson, supra*, 9 Cal.5th at p. 953.) The error here, as in *Anderson*, impacts the fairness of the trial and sentence.

The Attorney General also argues this case is different from *Anderson* because the unpled enhancements on five robbery counts in that case would have altered the defendant's strategy, since (1) the enhancements "imposed vicarious criminal liability on the defendant, whereas the enhancements pleaded on the accusatory pleading only punished the defendant for his own actions," and (2) the defendant believed "his potential maximum prison term was substantially less than the term of 189 years to life ultimately imposed." How defendant would respond had the One Strike allegation not been omitted from count two is a matter of speculation, but there is no doubt that the prosecution's defective pleading presaged a far lower sentence than the 25-year-to-life sentence (doubled under the Three Strikes law) ultimately imposed.

The Attorney General also argues that "the likely result of an objection" to the pleading would be an amendment curing the defect, thus "[d]eclining to apply forfeiture and reversing the One Strike sentence on count 2 would reward appellant for his failure to object," which the Attorney General deems "gamesmanship." This argument would seemingly apply to any case where a defendant failed to object to a defective pleading in the trial court, including *Anderson*, and, if inflexibly sanctioned, would all but do away with an appellate court's discretion to consider the merits in that circumstance. However, *Anderson* identified reasons where failure to object at trial did not work a forfeiture, which, as discussed, we find apply here. Further, the Attorney General points to nothing in the record indicating that defendant withheld objection in the trial court as a tactic in order to raise the pleading issue on appeal.

We conclude that defendant did not receive adequate notice of a potential One Strike sentence on count two and that sentence must be stricken.

Sentencing Under Both One Strike and Three Strikes Laws

Defendant argues that "the court erroneously relied on both the One Strike and Three Strikes Law in imposing sentences on counts one and two, even though [defendant] had suffered only a single prior conviction." As discussed, defendant's prior conviction

for forcible rape was alleged as a One Strike circumstance and a serious felony and prior strike under the Three Strikes law. Defendant was sentenced to two sentences of 25 years to life under the One Strike law and those sentences were doubled under the Three Strikes law to two sentences of 50 years to life.

Defendant relies on *Acosta, supra,* 29 Cal.4th 105. But that case in fact is fatal to his claim of error. The Supreme Court in *Acosta* held that the Three Strikes law applies notwithstanding a defendant's eligibility for a sentence under the One Strike law. The court reasoned that "the Legislature specified that the sentencing provisions of the Three Strikes law 'shall be applied in every case' where a defendant has a qualifying prior felony conviction, '[n]otwithstanding any other law.' (§ 667, subd. (f)(1).) This language indicates the intent to preclude, absent amendment of the Three Strikes law, a subsequent Legislature from rendering the Three Strikes law's sentencing provisions inapplicable to a particular felony conviction, either in every case involving that particular felony or under specified circumstances." (*Acosta, supra*, 29 Cal.4th at p. 121.)

The court in *Acosta* also found that the One Strike law supports applying both laws. Section 667.61, subdivision (f), "contemplates, and indeed requires, that in some cases, a defendant eligible for sentencing under the One Strike law will receive the punishment 'authorized under *any* other law.' [Citation.] Of course, the Three Strikes law is one such law." (*Acosta, supra*, 29 Cal.4th at p. 122.) Thus, the One Strike law establishes a minimum term as a floor, "but does not require sentencing under the statute to the exclusion of any other sentencing provisions, or preclude imposing a total sentence that is greater than the term of the One Strike law when other factors warrant greater punishment." (*Acosta, supra*, 29 Cal.4th at p. 124.)

Defendant suggests that *Acosta* holds that a single triggering circumstance under the One Strike law is expended for that purpose and unavailable for use under the Three Strikes law, or vice versa. Not so. The Supreme Court specifically rejected this

argument, explaining that the One Strike and Three Strikes laws have different objectives. "[B]ecause the Three Strikes law and the One Strike law serve separate objectives, ignoring one of these statutes where a defendant meets the criteria of both would defeat one of the Legislature's objectives. The 'unambiguous purpose' of the Three Strikes law 'is to provide greater punishment for recidivists. [Citation.]' [Citation.] The purpose of the One Strike law is to provide life sentences for aggravated sex offenders, even if they do not have prior convictions." (*Acosta, supra*, 29 Cal.4th at p. 127.)

In accordance with *Acosta*, the trial court properly determined the basic sentence under the One Strike law and doubled it as a second strike under the Three Strikes law.

Senate Bill No. 1393

Defendant argues that "this case should be remanded to the trial court to give that court the opportunity to exercise its sentencing discretion to strike the Penal Code section 667, subdivision (a) enhancement in the interests of justice pursuant to [Senate Bill No.] 1393 and amended Penal Code sections 667, subdivision (a) and 1385, subdivision (b)."

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amended sections 667, subdivision (a), and 1385, subdivision (b), to permit a court to exercise discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*); Stats. 2018, ch. 1013, §§ 1-2.) The prior versions of these statutes required the court to impose a five-year consecutive term for any person convicted of a serious felony and the court had no discretion to strike any prior conviction. (*Garcia, supra,* 28 Cal.App.5th at p. 971.)

Under the "*Estrada* rule" (*In re Estrada* (1965) 63 Cal.2d 740), Senate Bill No. 1393 applies "to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393 [became] effective on January 1, 2019." (*Garcia, supra,* 28 Cal.App.5th at p. 973.)

The Attorney General agrees that Senate Bill No. 1393 applies retroactively to defendant's case, but disagrees that remand is appropriate "because the trial court adamantly expressed its reluctance to reduce [defendant's] length of confinement if it possessed such discretion." We agree.

Remand is required unless "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] enhancement" even if it had the discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; see also *People v. Franks* (2019) 35 Cal.App.5th 883, 892-893; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) In reviewing whether the trial court made such an indication, we consider the trial court's statements and sentencing decisions. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419.) The trial court need not have stated it would not strike the enhancement if it had the discretion to do so. (*Ibid.*)

Here, there is a clear indication that the court would not exercise its discretion to strike the prior serious felony enhancements. At the sentencing hearing, the parties disputed whether defendant's sentences on counts one and two should be concurrent or consecutive. The court ultimately was persuaded by the prosecutor that under the One Strike and Three Strikes laws the sentences must be consecutive because they involved acts that happened at different times. (See §§ 667.6, subd. (d), 667.61, subd. (i), 1170.12, subd. (a)(6).) Nonetheless, the trial court addressed what it would have done if it had the discretion: "And even if I did have the discretion, the Court would order them to be served consecutively, as they were multiple acts on a very young and vulnerable child and they were heinous acts, sodomizing this young child -- and the impact on her life is a life sentence in itself, whether you recognize it or not, Mr. Montue." Likewise, the trial court found defendant statutorily ineligible for probation, but commented that if he was, probation would not be appropriate given "his prior history of sexual assaults, the age of the victim in this case, his continued conduct -- which the Court finds is a danger to our

community and society in general," in addition to his six prior prison terms.

This record establishes that the trial court was not inclined in any way to exercise discretion in favor of leniency towards defendant. We therefore will not remand this case for resentencing under Senate Bill No. 1393.

DISPOSITION

The sentence imposed under the One Strike law on count two is stricken and the matter is remanded for resentencing on count two. The judgment is otherwise affirmed.

/s/
RAYE, P. J.

We concur:

/s/
ROBIE, J.

/s/
MAURO, J.